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February 8, 2012

VIA ECF

Hon. Nicholas G. Garaufis  
United States District Judge  
U.S. District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: United States v. City of New York, No. 07-CV-2067(NGG)(RLM)

Dear Judge Garaufis:

An issue has arisen as to whether the Vulcan Society should receive applicant email addresses from the City so that the Vulcan Society can invite applicants to attend tutorials for the upcoming firefighter examination. The parties submitted letters and emails to the Monitor and met and conferred with the Monitor via telephone on Thursday, January 26, and again on Thursday, February 2, 2012, but have not been able to resolve this issue. This letter contains the Monitor's recommendation, and the Monitor respectfully requests that the Court issue a ruling.

Parties' Positions Concerning Tutorials

The City has informed the Monitor that, as has been the City's practice for prior exams, the City intends to provide in-person tutorials to applicants to assist them in preparing for Exam 2000.

The parties have reached agreement that the City may send an email to applicants advising them that tutorials will be held, which will advise applicants of tutorials being offered by the City as well as by the Vulcan Society and other fraternal organizations. The email will contain a brief description of each of these fraternal organizations, with links to their websites (where available) where applicants can go to obtain information.

The Vulcan Society has expressed a desire to invite all applicants to tutorials hosted by the Vulcan Society, again as has been the Vulcan Society's practice for prior exam cycles, via postal mail, email and text, and seeks address data to facilitate such outreach. The Vulcan

**COHEN & GRESSER LLP**

Hon. Nicholas G. Garaufis  
February 8, 2012  
Page 2

Society also would like to send targeted information to Black applicants with a military background, whose bonus points for military service increase the likelihood of their ultimately attaining appointment.

The City proposes that in lieu of the Vulcan Society being provided with email and postal address data directly, candidates interested in Vulcan Society tutorials could respond to the City's email described above by replying to an email address embedded in the City's email. Replies would go to an email box set up by the Vulcan Society, which could then communicate directly with those persons who chose to indicate interest by replying to the Vulcan Society email link in the City's email.

The City's Position

During the parties' communications on this issue, the City raised three primary areas of concern:

- Caution regarding applicant privacy and a reluctance to release applicant data to the Vulcan Society, which the City characterizes as a "third party" to whom access may not be permitted under the City's privacy policy, in part because, according to the City, the Vulcan Society seeks to act independently of the City.
- Desire to convey a unified and inclusive message and avoid fostering confusion or a perception of lack of interest on the part of the City, which the City is concerned may arise if there appear to be "rival" tutorials. The City states that its proposal to coordinate emails with the Vulcan Society through an introductory City email would reduce this concern.
- Ability to maintain a centralized record of who registered for tutorials (in turn providing the City with a more comprehensive way to track the success of particular tutorial curricula and determine whether tutorial attendance correlates to exam success and/or reduced attrition). In particular, the City wishes to have applicants "RSVP" to the City via email in advance of tutorials to help ensure that attendance can be recorded and that enough sessions will be scheduled, in the right locations.

**COHEN & GRESSER LLP**

Hon. Nicholas G. Garaufis  
February 8, 2012  
Page 3

The Vulcan Society's Position

The Vulcan Society's response to the City's concerns is summarized below:

- As with home visits, the Vulcan Society disagrees that its members, who are active firefighters, are "third parties." The Vulcan Society agrees that, as with the home visits, applicant contact data is to be used solely for the purpose of test-prep and post-exam assistance, and has offered to share any email communications intended for distribution to applicants with the City in advance of sending.
- The Vulcan Society believes that email contact is useful because even if an applicant does not actually attend the tutorials, the invitation to do so may open a channel of communication with the Vulcan Society and the mentoring and other support it is willing to offer. Given the significance of mentoring for all entry level firefighter applicants, and the relative dearth of a friends and family network for entry level Black and Hispanic applicants as found by the Court, the Vulcan Society believes it is necessary to provide encouragement that is supplemental to the support offered by the City.
- The Vulcan Society states that it has not required RSVPs in the past for Vulcan Society tutorials, but is willing to keep records of actual attendance at the tutorials.

In correspondence dated February 6, 2012, the Vulcan Society advised the Monitor that members of the Vulcan Society are willing to privately fund the expense of a commercial test developer to help develop what the Vulcan Society believes will be a more robust tutorial curriculum than the test preparation being offered by the City. This effort would need to begin promptly. As described by the Vulcan Society, their test preparation would include "two separate curricula, each with dozens of sample questions in the areas that, according to the Notice of Exam, will be tested (such as reading comprehension, basic math and information ordering)."<sup>1</sup> The Vulcan Society represents that in 2007 (when the City Council provided funding), the cost of the same test developer was \$10,000, and that the Vulcan Society is reluctant to make a similar investment from its own funds without sufficient ability to publicize the resulting tutorials. The Vulcan Society directed the Monitor to comparable private preparation courses charging \$300 (which they suggest might be prohibitive for some applicants), and notes that commercial alternatives to the Vulcan Society's tutorials do not (like

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<sup>1</sup> The Vulcans have advised the Monitor that they intend to charge "what [the applicant] can pay" up to a suggested amount of \$15 - \$20, subject to an understanding that no one will be turned away because of his or her inability to pay. Applicants will be offered the ability to attend unlimited sessions.

**COHEN & GRESSER LLP**

Hon. Nicholas G. Garaufis  
February 8, 2012  
Page 4

the Vulcan Society's tutorials) incorporate a Black firefighter presence to visibly exemplify that career track and create mentorship opportunities.

By email dated February 7, 2012, the United States advised of its agreement with the Vulcan Society's position, in light of the fact that Vulcan Society tutorials would be open to all applicants.

As was the case with home visits, the Monitor believes that both parties have raised valid concerns.

Again, the Monitor notes the Court's emphasis in its Findings of Fact on the importance of informal support networks to prospective firefighters, and the fact that Black firefighter candidates are "significantly less likely to have similar informal support mechanisms available to them because of the City's history of using discriminatory testing procedures." Findings of Fact at 14-15. The tutorial program and ongoing mentoring proposed by the Vulcan Society address a need for informal support networks among Black firefighters. The Vulcan Society's offer to host tutorials (they estimate as many as 1,000 attendees) holds promise of a significant pay-off in terms of fostering enduring mentoring relationships throughout the duration of the application process. The potential gain inures not only to Black applicants, but to all firefighter applicants, since the Vulcan Society has offered to open their sessions to all who wish to attend.

The Monitor continues to take the view that, as City employees, the Vulcan Society members are not "third parties," and that the City's privacy policy advised applicants that their names might be included on lists for follow-up for governmental purposes.

The Monitor also recognizes the importance of City messaging and public perception that the FDNY welcomes qualified people of all backgrounds, and agrees with the City on the desirability of a unified and inclusive recruiting message.

The Monitor has not been supplied with any curriculum materials for either the City's forthcoming live tutorials, or the Vulcan Society's proposed tutorials. This recommendation therefore is not based on any assessment of tutorial material content, but instead is based on an evaluation of the parties' stated goals and concerns.

Monitor's Recommendation

In light of all the above, the Monitor recommends as follows:

The Monitor recommends that the City be directed to provide applicant email address information to the Vulcan Society (and to other fraternal organizations that may request such

**COHEN & GRESSER LLP**

Hon. Nicholas G. Garaufis  
February 8, 2012  
Page 5

data) on the terms set out herein and solely for the following purposes: contacting applicants to introduce the Vulcan Society, inviting applicants to Vulcan Society tutorials, and inviting applicants to supply the Vulcan Society with home address or other data if the applicants wish to do so.

Until an applicant has specifically agreed to follow-up contact with the Vulcan Society via email or otherwise, the Vulcan Society should provide the parties and the Monitor in advance with the text of any proposed email communications to such applicant, so that the other parties have an opportunity to review the content of such communications and the Monitor can resolve any disputes that may arise. In view of privacy concerns raised by the City, it is not recommended that home address information be provided at this time.

The Vulcan Society should maintain lists of names of tutorial attendees so that the City can incorporate such data into its assessments of program effectiveness and predictive value.

The City should also be permitted to inform applicants of the various fraternal organizations that have agreed to offer tutorial sessions, and to advise applicants of contact data and website links for such fraternal organizations, including the Vulcan Society.

Respectfully submitted,

/s/

Mark S. Cohen

cc: All Counsel